88-713

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

ACTION AUTOMOTIVE, INC.,
Petitioner.

v

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

– AND APPENDICES –

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Dated:
October 25, 1988

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QUESTION PRESENTED

WHETHER HIGH EMPLOYEE TURNOVER AND/OR MASSIVE FUNCTIONAL AND OPERATIONAL EXPANSION RELIEVES AN EMPLOYER OF ITS DUTY TO BARGAIN UNDER THE NATIONAL LABOR RELATIONS ACT, WHEN APPROXIMATELY FIVE YEARS HAVE PASSED SINCE THE UNION'S CERTIFICATION, THE EMPLOYER HAS ACTED IN GOOD FAITH AND BARGAINING HAS NOT YET BEGUN.

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ACTION AUTOMOTIVE, INC.,

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v

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Action Automotive, Inc.[1], respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 2, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals, published at 853 F2d 433 (6th Cir. 1988) appears in the Appendix hereto (B-1). The opinion of the National Labor Relations Board, published at 284 NLRB No. 36 (1987), and the unpublished opinion of the Administrative Law Judge also appear in the Appendix (C-1 and D-1, respectively).

[1] Action Automotive, Inc. has no parent, subsidiary or affiliate corporations.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 2, 1988, and this petition for certiorari has been filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, 29 USC §§ 157, 158(a)(1), 158(a)(5), and 159(a).

Section 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 USCS § 158(a)(3)].

Sections 158(a)(1) and 158(a)(5):

> It shall be an unfair labor practice:
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7 [29 USCS § 157];
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject

to the provisions of section 9(a) [29 USCS § 159(a)].

Section 159(a):

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect; Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF THE CASE

In April 1981, Retail Store Employees Local 40, United Food and Commercial Workers International Union, AFL-CIO, herein called "Local 40," filed petitions seeking to represent the Flint, Michigan area store-warehouse and office employees employed by Action Automotive, Inc. The National Labor Relations Board ("the Board") conducted elections in separate store and office units on May 29, 1981. Determinative challenges existed in both units. After a Hearing Officer and the Board made various findings regarding the afore-

mentioned challenges, Local 40 was ultimately certified in both units. Local 40 prevailed in the office unit by one (1) vote (5-4) and in the store-warehouse unit by two (2) votes (20-18). No other unfair labor practice charges have been brought against Action Automotive, Inc. since this election.

The Employer refused to bargain in an effort to appeal the findings made in the representation matter. On June 24, 1982, the Board denied the appeal and ordered the Employer to bargain with Local 40. 262 NLRB 423 (1982). On September 30, 1983, the United States Court of Appeals for the Sixth Circuit denied enforcement of the Board Order. *Action Automotive, Inc* v *NLRB*, 717 F2d 1033 (6th Cir. 1983) rev'd 469 US 490 (1985).

On February 19, 1985, the United States Supreme Court, by a 6-3 vote, reversed the Sixth Circuit and enforced the Board's order. *Action Automotive, Inc* v *NLRB*, 469 US 490, 83 LEd2d 986, 105 SCt 984 (1985). On May 13, 1986, the Sixth Circuit vacated its earlier judgment.

On March 18, 1985, Local 876 of the United Food and Commercial Workers International Union transmitted correspondence to the Employer announcing that it had merged with Local 40. Local 876 asked for the names and addresses of unit employees and requested bargaining in accordance with the United States Supreme Court decision. The request for information (not a request to meet) was repeated via correspondence dated February 4, 1986. On March 20, 1986, Local 876 filed an unfair labor practice charge against Action Automotive, Inc. and on August 7, 1987, a complaint was issued by the Regional Director of the NLRB alleging that Action Automotive violated §§ 8(a)(5) and 8(a)(1) of

the National Labor Relations Act by refusing to furnish the information requested by Local 876.

On or about February 10, 1987, the Administrative Law Judge (hereinafter "ALJ") issued his decision in this matter (D-1). The ALJ found that the Respondent had committed an unfair labor practice by refusing to furnish Local 876 with the names and addresses of the employees in the appropriate bargaining units.

Action Automotive filed Exceptions to the ALJ's conclusions of law. In particular, Respondent excepted to the ALJ's conclusion that employee turnover and/or the functional and operational changes in Action Automotive's business did not render the bargaining units inappropriate and thus relieve the Employer of an obligation to furnish information.

The Board issued its Decision and Order on or about June 16, 1987 and affirmed the ALJ's rulings, findings and conclusions at 284 NLRB No. 36 (C-1).

On August 12, 1987, the Board's Application for Enforcement of an Order of the National Labor Relations Board was filed with the Sixth Circuit Court of Appeals and on August 2, 1988, the Court of Appeals enforced the decision and order of the NLRB (B-1).

In the Flint election, approximately thirty-nine (39) individuals voted in the store-warehouse unit and nine (9) voted in the office unit. Of all individuals eligible to vote, and/or who voted, only four (4) are still employed by the Employer. One is a District Manager based in Lansing and thus is no longer in the alleged appropriate unit, and a second (Mildred Sabo) was ruled ineligible to vote by the Supreme Court. Of the remaining two (2) employees, one each is employed in the office and store-warehouse unit. Furthermore, of those employees originally eligible to vote, twenty (20) had terminated

their employment with Action Automotive, Inc. within one (1) year following the election.

By February 19, 1985 (date of the Supreme Court ruling), a total of ninety (90) individuals were employed in the store/warehouse classifications at the stores which participated in the 1981 election, and twenty-five (25) were employed in the office unit. On May 13, 1986 (date the Sixth Circuit vacated its Order), there were one hundred forth-five (145) in the store-warehouse area and thirty-four (34) in the office.

As of October 16, 1986, which is the payroll period closest to the date of the hearing before the Administrative Law Judge in the present case, one hundred fifty-four (154) were employed in the store-warehouse unit and forty-eight (48) in the office unit.

All nine (9) Flint-area stores in existence at the time of the election are still operating. Three (3) of these nine (9) stores have been relocated but remain within the Flint market area. One (1) store was increased in footage from 800 to 6000 square feet with over half the expanded area being devoted to automotive service functions provided by mechanics. In fact, the three (3) stores that were relocated all expanded operations beyond the selling of automotive parts to also include gasoline and service functions. Further, another of the original stores that did not move also expanded operations to include service functions and, like other Action Automotive, Inc. stores, operates twenty-four (24) hours a day. Of the stores that introduced service functions, three (3) added six (6) to eight (8) service bays and another added thirteen (13) bays.

There are now sixty-four (64) stores company-wide, including seven (7) new Flint-area stores which have become operational since the election.

REASON FOR GRANTING THE WRIT

THE SIXTH CIRCUIT COURT OF APPEALS DECIDED AN IMPORTANT QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

In *Brooks* v *NLRB*, 348 US 96, 99 LEd 125, 75 SCt 176 (1954), this Court first adopted the "certification year" rule establishing that a union's certification must be honored "for a reasonable period, ordinarily one year, in the absence of *unusual circumstances.*" *Id.* at 98. In *Brooks*, unusual circumstances were found to *include* the following: "(1) the certified union dissolved or became defunct; (2) as a result of a schism, substantially all the members and officers of the certified union transferred their affiliation to a new local or international; (3) the size of the bargaining unit fluctuated radically within a short time." *Id.*

Two aspects of this test have not been resolved, and merit consideration by this Court. The first issue is whether, and under what circumstances, employee turnover may be considered an "unusual circumstance" under *Brooks*. *Brooks* does not specifically identify employee turnover as one of the scenarios included as being an unusual circumstance. However, because the three given scenarios are not an exclusive classification of unusual circumstances, other circumstances may also be considered as unusual.

Moreover, the similarity between massive employee turnover and the listed scenarios justifies its consideration as an unusual circumstance. For example, such turnover is very much like a transfer of affiliation as the result of a schism where the employees' affiliation has been changed, or a radical fluctuation in the size of the bargaining unit over a short period of time.

In *St. Regis Paper Co*, 285 NLRB No. 36, 126 LRRM 1017 (1987), the Board issued a Decision and Order in 1978 finding, in part, that the employer had violated §§ 8(a)(5) and (1) of the NLRA by refusing to bargain with the union. After remand from the First Circuit, the Board reconsidered its decision and determined the employer was not required to bargain with the union despite its prior violations. The Circuit Court was concerned that more than five years had passed since the underlying facts giving rise to the Board decision took place, and more than three years had elapsed since the Board's first decision was issued. During that time, the employer had closed two of its facilities. Additionally, the turnover at one facility was such that there was "no evidence that any unit employees at the Colson Field garage have been or wish to be represented by the Union. The Board's bargaining order, if enforced, would have the undesirable result of requiring that current employees be represented by a union they have not chosen to represent them." 126 LRRM 1017, 1018. As a result, the Board found that the bargaining order was "moot and no longer appropriate . . ." *Id.* at 1019. The circumstances in the present case are likewise sufficiently "unusual" to justify consideration by this Court.

Similarly, in *St. Bernadette's Nursing Home*, 234 NLRB No. 130 (1978), the employer closed a unionized nursing home approximately two months after the union had been certified. Subsequently, the employer opened a new facility where the employees of the closed facility were encouraged to apply. Since the vast majority of employees at the new facility had not worked at the closed facility, the effective turnover was large. The Board held that the union was not certified at the new facility, and that even if it had "the circum-

stances here are sufficiently unusual to fall within the exception of the *Ray Brooks* holding." *Id.* at 837.

Likewise, in *Molded Fiber Glass Body Co,* 182 NLRB No. 59 (1970), the Board found that "a sudden or precipitate revolution in the employee complement is as sound a basis for an exception (to the one-year certification rule) as sudden expansion." *Id.* at 403.

In the present case, although change in the employment complement did not occur over an extremely short period of time, the time during which Petitioner could have bargained, while still protecting its rights, was very short. As the record reveals, a large portion of the employee turnover occurred during the first year after the union election. During this time, Petitioner was seeking judicial review of the union's certification. Thus, no bargaining occurred since the union's majority status was in doubt. The employer's only way to obtain judicial review of the union's certification was to refuse to bargain. Even to consult with the union, while challenging its certification, could have seriously jeopardized the employer's challenge. As explained in *Peabody Coal Co* v *NLRB,* 725 F2d 357, 365 (6th Cir. 1984):

> When . . . an employer is engaged, as this employer is, in a technical 8(a)(5) violation — the only means by which it may obtain judicial review of union certification, *Pittsburgh Plate Glass Co* v *NLRB,* 313 US 146, 151, 61 SCt 908, 911 L Ed 1251 (1941); *NLRB* v *Blades Manufacturing Corp,* 344 F2d 998, 1002 (8th Cir. 1965) — its recognition of the union for purposes of consultation is, at best, inconsistent with its opposition to certification. That inconsistency could jeopardize its chances of success in future litigation. *Blades Manufacturing,* 344 F2d at 1005. At

> worst, recognition of the union proceedings, even "limited recognition" of the sort the board envisages here, may be taken as a waiver of objections to union representation. *King Radio Corp* v *NLRB*, 398 F2d 14, 20 (10th Cir. 1968). There is no legal basis to force such a choice.

Indeed, an employer who fails to engage in this technical refusal to bargain *waives* the right to contest the union's certification. *Id.*; *Technicolor Government Services, Inc* v *NLRB*, 739 F2d 323, 326 (8th Cir. 1984); *King Radio Corporation* v *NLRB*, 398 F2d 14, 20-21 (10th Cir. 1968). Therefore, to avoid waiving its challenge of the union's certification, Action Automotive could not bargain with Local 876 prior to the Supreme Court's ruling on February 19, 1985. By that time, a radical turnover in the employee complement had occurred, as well as significant growth in the size of the bargaining units. Only two employees eligible to vote in the original election were still bargaining unit members. Forty-eight (48) employees voted in the original elections. At the time of the Supreme Court's ruling, the combined bargaining units included one hundred fifteen (115) employees. Thus, Action Automotive was faced with a unique situation. Employee turnover was near one hundred (100%), and the number of bargaining unit employees had more than doubled by the time Local 876 requested bargaining on March 18, 1985. In sum, "unusual circumstances" existed in light of the Employer's inability to effectively engage in bargaining until February, 1985. When viewed in totality, the obligations which arose herein encompass but a short period of time.

Whether such circumstances constitute a fluctuation in the bargaining unit "within a short time" under this

Court's ruling in *Brooks, supra,* is an important question of federal law which this Court should decide.

Furthermore, a number of Circuit Courts of Appeal now consider employee turnover to be a determining factor in the issuance of a bargaining order when the employer has committed unfair labor practices which taint the election process. Thus, in *NLRB* v *Knogo Corp,* 727 F2d 55 (2nd Cir. 1984), the employer had engaged in several unfair labor practices prior to an election, including coercive interrogation, surveillance, disparate enforcement of rules, granting economic benefits to discourage union support and coercively selecting union supporters to meet with management before the election. Subsequently, although the union had previously obtained a sufficient number of authorization cards to indicate success at the election, the union lost the election by a vote of 68-21. In declining to follow the Board's directive that the employer bargain with the union, the Court explained that: "Among the possibly mitigating factors the NLRB was obliged to consider were the passage of time and rate of employee turnover since the time of the violations. *NLRB* v *Marion Rohn Corp, Inc,* 714 F2d 228, 231 (2nd Cir. 1983)." *Id.* at 60.

In *Knogo, supra,* three years had elapsed between the time of the election and the issuance of the Board's bargaining order. The Court explained: "that substantial lapse of time casts doubt on whether the employee preference for the union, expressed prior to the 1979 elections through authorization cards, still reflected a majority will . . ." *Id.* Additionally, only 20 of the 101 employees who were employed at the time of the election remained. The bargaining unit itself had shrunk from 101 employees to 52. On this issue, the Court reasoned that ". . . where there has been a large turnover

in employees between unfair practices and a Board's order '[t]he effect of a bargaining order could thus easily be to impose upon the employees a union not desired by the majority of them.'" *Id.*

In *J. J. Newberry Co* v *NLRB*, 645 F2d 148 (2nd Cir. 1981), the Court denied a bargaining order where there had been 63% turnover and "no indication that the employer in any way deliberately created delay in order to profit from it and, . . ." because "the unfair labor practice involved was not egregious in the first place . . ." *Id.* at 154. Other circuits also consider employee turnover in unfair labor practice cases which involved the issuance of an order to bargain. (See, *e.g.*, *Red Oaks Nursing Home, Inc* v *NLRB*, 633 F2d 503 (7th Cir. 1980); *NLRB* v *Western Drug*, 600 F2d 1324 (9th Cir. 1979); *NLRB* v *Pace Oldsmobile*, 681 F2d 99, 100 (2nd Cir. 1982) (*per curiam*); *NLRB* v *M. Koppel Company*, 412 F2d 681, 687 n. 16 (3rd Cir. 1969).

Thus, several courts have been willing to consider employee turnover in the decision to issue a bargaining order, even in the face of egregious employer unfair labor practices. A bargaining order, like the certification of a union, represents the initiation of an employer's duty to bargain with the union. Since employee turnover is relevant to the issuance of a bargaining order, this Court should consider whether turnover should likewise be a consideration in the application of the certification year rule, particularly where the turnover has occurred in the absence of employer unfair labor practices.

The second primary issue this Court should decide is whether employer operational and functional expansion can constitute an unusual circumstance under *Brooks*. Since one of the listed "unusual circumstances" established in *Brooks* is a radical fluctuation in the bar-

gaining unit size over a short period of time, an employer's rapid expansion and the resultant rapid increase in bargaining unit size over a short period of time should satisfy this test.

The NLRB has considered the effect of employer expansion on the duty to bargain during the certification year. For example, in *Westinghouse Electric and Mfg Co*, 38 NLRB 304, 9 LRRM 281 (1942), the Board refused to adhere to the certification year rule where the employer's planned expansion quadrupled the number of employees at its facility. In *Renaissance Center Partnership*, 239 NLRB 1247, 1248 (1979), the Board found that the "majority status of the certified representative can no longer be presumed" where the consolidation of two units during the certification year resulted in a significant increase in the size of the bargaining unit.

In the instant case, the number of employees at the stores included in the election quadrupled from the date of the election to the time of the original hearing of this matter before the Administrative Law Judge. Thus, there is no doubt that a radical fluctuation in employee complement has occurred. Further, this growth occurred in the absence of unfair labor practice charges. Given Petitioner's inability to bargain with the Union during the appeal of the Union's certification (as discussed above), this Court should consider whether the massive expansion effectively occurred over a short period of time.

Alternatively, this Court should consider whether the expansion satisfies the *Brooks* test, even if the growth is not considered to have occurred over a short period of time. For example, in *NLRB* v *Frederick's Foodland, Inc*, 665 F2d 88 (6th Cir. 1981), the NLRB issued a Complaint alleging the employer committed several un-

fair labor practices after the union had lost the election. Included as allegations were "coercive interrogation of employees, solicitation of grievances from employees, creating the impression of surveillance of union activities, communicating to employees that their support of the union could be futile, promising benefits and granting an across-the-board wage increase shortly before the election . . ." *Id.* at 89. In refusing to issue a bargaining order, the court relied upon the following factors: "The large increase in the number of employees in the unit due to the reopening of the second store, the passage of time since the first election, and the nature of the unfair labor practices found by the board." *Id.* at 90. In that case, the unit expanded from approximately 49 employees to about 85 employees. In the present case, the number of employees quadrupled in the absence of unfair labor practices. Although *Frederick's, supra,* did not involve a certification year issue, it reveals the need to consider employer expansion in determining whether an employer has a duty to bargain with a union, particularly where, as in the instant case, the employer has acted in good faith, and in the absence of unfair labor practice charges.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDICES TO PETITION FOR CERTIORARI

• • •

APPENDIX A

ORDER DENYING MOTION TO STAY MANDATE

(United States Court of Appeals — Sixth Circuit)

(Filed September 29, 1988)

(NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. ACTION AUTOMOTIVE, INC., Respondent — NO. 87-5923)

Upon consideration of respondent's motion to stay the mandate,

And further considering the response in opposition thereto,

It is ORDERED that the motion be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

APPENDIX B

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed August 2, 1988)

(NATIONAL LABOR RELATIONS BOARD, Petitioner, v. ACTION AUTOMOTIVE, INC., Respondent — NO. 87-5923; PETITION FOR ENFORCEMENT of Decision of National Labor Relations Board [TYPEWRITTEN: *Stocking/Young 7-CA-25638; 284 NLRB No. 36; J-2350*])

BEFORE: LIVELY and JONES, Circuit Judges;
and PECK, Senior Circuit Judge

PER CURIAM.

The National Labor Relations Board petitions for enforcement of its decision finding that the respondent employer Action Automotive, Inc. violated § 8(a)(5) and (1) of the National Labor Relations Act by refusing to supply information to Local 876, United Food and Commercial Workers International Union (the union) on request. 284 NLRB No. 36. For the reasons set out herein, we grant enforcement.

I.

In May 1981 Local 40 of the union won Board-conducted elections in separate store and office units of the respondent's Flint, Michigan operations. Because of the closeness of the votes, the respondent refused to bargain with the union in order to test the certification on appeal. The Board denied the appeal and ordered the respondent to bargain upon request. The Board specified

that the certification year would begin when the respondent commenced good faith bargaining with the union. 262 NLRB 423 (1982). This court denied enforcement of that decision and order, but on February 19, 1985, the Supreme Court reversed. *Action Automotive, Inc.* v. *N.L.R.B.*, 717 F.2d 1033 (6th Cir. 1983), *rev'd*, 469 U.S. 490 (1985). Thereafter, this court vacated its earlier order and enforced the Board's bargaining order in full. 794 F.2d 213 (1986).

Meanwhile on March 18, 1985, Local 876 informed the respondent that it had merged with Local 40. Local 876 requested the names and addresses of all unit employees and that the union bargain with it in compliance with the Supreme Court's decision. The respondent refused the request for names and addresses of unit members and a new unfair labor practice charge was filed on March 20, 1986. In agreement with the administrative law judge who conducted a hearing, the Board found that the respondent violated its duty to bargain in good faith by failing to furnish the requested information. The Board's order requires the respondent to cease and desist from this and other unfair labor practices and from interfering in any way with its employees' § 7 rights, and affirmatively requires it to furnish the requested information and to post a notice.

II.

In this court the respondent argues that the Board erred in concluding that a large employee turnover and a "massive functional and operational expansion" have not rendered the bargaining units inappropriate. The respondent notes that there has been nearly a 100 percent turnover in employees while the total number of employees in the bargaining units has nearly doubled. It also discusses the fact that a number of its stores in

the Flint area have been relocated and have expanded in size and function.

The respondent emphasizes that it has acted in good faith throughout the period since the election, having succeeded in its appeal to this court from the original bargaining order, and having lost in the Supreme Court by a 6-3 vote. It argues that when an employer does not deliberately create delay, turnover that occurs during good faith efforts to obtain a judicial reversal of Board action should be a factor in determining the continuing appropriateness of a bargaining unit.

The Board contends that this case is controlled by the "certification year" rule which holds that in the absence of unusual circumstances there is an irrebuttable presumption that the union retains majority status for one year after certification following a Board-conducted election. *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 104 (1954). The Board argues that neither employee turnover nor operational changes and expansion are such "unusual circumstances" as to create an exception to the certification year rule in this case. Since the respondent has never engaged in good faith bargaining with the union, the certification year has not yet begun.

III.

In *N.L.R.B.* v. *Washington Manor, Inc.*, 519 F.2d 750, 753 (6th Cir. 1975), this court stated that "[a] high turnover of employees unaccompanied by objective evidence that new employees do not support the union is no evidence of loss of majority status by the union." In *Fotomat Corp.* v. *N.L.R.B.*, 634 F.2d 320 (6th Cir. 1980), the employer argued that a 50 percent increase in work locations and employees and a "massive turnover" of employees following a representation election justified a reasonable doubt as to the union's majority

status. The court adhered to its requirement that there must be objective evidence of loss of majority support for the union as enunciated in *Washington Manor. Id.* at 327. It dealt with the expansion claim as follows:

> The plain answer to this claim is that the bargaining unit specified in the Board's order is limited to the employees at the 26 Fotomat locations which were in operation at the time of the election. These 26 locations are specifically listed in the Board's description of the bargaining unit which the union is certified to represent. Thus the election and the certification of the union have no effect on the employees at the new Fotomat locations.

Id. Applying this reasoning, the respondent's claim of massive expansion is unpersuasive since the certification affects only present employees at the locations in existence when the election was held. Those employees are presumed to adhere to the union for one year from the time the respondent begins good faith bargaining. As we understand the record all nine Flint area stores in existence at the time of the election are still in operation, and the six new Flint area stores are not covered by the certification.

Our decision in *N.L.R.B.* v. *Frederick's Foodland, Inc.*, 655 F.2d 88 (6th Cir. 1981), does not require a contrary result. In that case the union had lost a representation election. The Board then issued a bargaining order on the basis of a finding of pervasive unfair labor practices. This court denied enforcement of the bargaining order, finding that the unfair labor practices would not prevent a fair election. Among the factors considered by the court were a large increase in the number of employees occasioned by the opening of a new store, and the passage of time since the first election. The "certifi-

cation year" rule did not apply in *Frederick's Foodland*, and a new election could be held at any time. Those conditions do not exist in the present case.

The respondent relies on two Board decisions in support of its "massive expansion" argument. Both, however, involved truly unusual circumstances that are not present in this case. *Westinghouse Electric & Manufacturing Co.*, 38 N.L.R.B. 404 (1942), concerned an extraordinary increase in the number of employees at a defense plant in the early months of World War II. There was a contest between two unions desiring to represent the employees and the Board made an exception to its usual rule of not entertaining a petition for investigation and certification within one year of the issuance of a certification "in view of the circumstances." *Id.* at 409. *Renaissance Center Partnership*, 239 N.L.R.B. 1247 (1979), involved the consolidation of two units during the certification year. One of the units had been represented by a union, while the other, which was a larger unit, had been non-union. The Board found that the previously certified unit was no longer appropriate because the employees who would be added would "numerically overshadow[ ]" the existing unit. *Id.*

As the Board points out in its brief, neither *Westinghouse* nor *Renaissance Partnership* involved employer refusals to bargain. The exception to the certification year rule permitted in those two cases applies only when the Board, because of unusual circumstances, considers a formal petition for an election filed during the certification year, not when an employer has resorted to "self-help" by refusing to bargain. In *Brooks*, the Supreme Court declined to recognize an employer's right to refuse to bargain because of doubts about a certified union's continuing majority status, stating:

> If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit. Although the Board may, if the facts warrant, revoke a certification or agree not to pursue a charge of an unfair labor practice, these are matters for the Board; they do not justify employer self-help or judicial intervention.

348 U.S. at 103 (footnote omitted).

The decision and order of the Board are enforced.

APPENDIX C

DECISION AND ORDER

(United States of America —
National Labor Relations Board)

(Dated June 16, 1987)

(ACTION AUTOMOTIVE, INC. and LOCAL 876, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO–CLC — Case 7-CA-25638; 284 NLRB No. 36; DSC D-4498; Flint, MI)

On 10 February 1987 Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

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[1] The Respondent did not file exceptions to the judge's determination that Local 876, United Food and Commercial Workers International Union, AFL-CIO-CLC, as a result of a merger, became the successor to Local 40, UFCW, the certified representative.

In affirming the law judge's conclusion that the Respondent has an obligation to bargain with the Union, we find it unnecessary to pass on the judge's general discussion of the effect of employee turnover on presumptions of union majority status. Rather, our finding of a bargaining obligation here is based on the principles, referred to by the judge, that (1) absent unusual circumstances, a union's majority status is *irrebuttably* presumed to exist throughout the 1-year period following the union's certification, *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 98 (1954); (2) the 1-year period following the

(*concluded on page C-2*)

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Action Automotive, Inc., Flint, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C., 16 June 1987

Donald L. Dotson, Chairman
James M. Stephens, Member
(SEAL) Mary Miller Cracraft, Member

NATIONAL LABOR RELATIONS BOARD

(*continued from page C-1*)

instant Union's certification, during which its majority status will be irrebuttably presumed, shall be construed under the instant circumstances not to begin until the date that the Respondent begins to bargain in good faith with the Union, *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); and (3) the employee turnover in the instant case from the time of the Union's certification is not the sort of "unusual circumstance" (such as dissolution of or substantial schism within the Union) that would permit rebuttal of the Union's presumed majority status, *Ray Brooks* v. *NLRB*, supra; *National Plastic Products Co.*, 78 NLRB 699, 706-707 (1948) (even if substantial turnover during the certification year resulted in actual loss of majority support, union would still retain statutory status as exclusive bargaining representative for duration of certification year).

Upon the entire record[1] in this proceeding[2], including consideration of post-hearing briefs, it is hereby found as follows:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Michigan corporation, with a main office in Flint, Michigan, and facilities located throughout the State of Michigan from which it is engaged in the retail sale and distribution of automobile parts and related products and services. In the course of said oper-

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[1] Pursuant to stipulation of the parties, the record is hereby reopened for the limited purpose of receiving Joint Exhibit 1, which was submitted following close of the hearing.

[2] Errors in the Official Transcript of proceedings are hereby corrected as follows:

Page	*Line*	*Delete*	*Substitute*
4	8	Provision	Division
4	9	residing	presiding
14	11	recorded	reported
14	18	unrecorded	unreported
14	19	..	..
37	17	photographic	geographic
39	9	governing	government
42	9	$50	$.50
42	20	..	..
43	16	Not	No,
44	9	Local	Local Union Hall
47	12	Barbe	Berbe
49	22	unions	units.
60	12	traumatic	dramatic
60	14	..	..
60	18	..	..
66	10	put something ruth	is not telling the truth
66	18	traumatically	dramatically
67	17	..	..
68	8	cash	wash
68	12	fine	find
71	15	made	moved
73	1	mine	mind.
76	17	taling	talking

ations, during the calendar year ending 31 December 1985, a representative period, Respondent derived revenues exceeding $500,000 in value, and received at its Michigan locations automobile parts and other goods and materials valued in excess of $50,000 which were transported directly from points located outside of that State.

The complaint alleges, the answer admits, and it is found that Repondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and it is found that Local 876, United Food and Commercial Workers International Union AFL-CIO, herein called Local 876, is and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

This case raises policy issues which transcend the limited question raised by the pleadings. It also furnishes a new battleground for Respondent's continued challenge to the validity of certifications of representative issued 5 years earlier by the Board. Thus, by virtue of elections conducted on 29 May 1981, the Board, in January 1982, certified that Local 40, United Food and Commercial Workers International Union, herein called Local 40, a sister local and an alleged predecessor to Local 876, was the majority representative in separate units of Respondent's employees. The certifications were contested by Respondent, but upheld by the Board

in a subsequent 8(a)(5) proceeding.[3] Litigation continued[4] until the Supreme Court on 19 February 1985 affirmed the Board, and remanded the proceeding for appropriate action.[5] The Board's 1982 Order directing Respondent to recognize and bargain in the separate units was finally enforced by the Sixth Circuit Court of Appeals on 13 May 1986.[6]

In the interim, during the summer of 1982, Local 40 was absorbed by Local 876 through an internal merger. The proponents of the complaint contend that Local 876, by virtue of that reorganizat,ion, succeeded to, and acquired all enforceable representation interests held by Local 40.

In the instant proceeding, there is no dispute concerning Respondent's failure at any time to bargain collectively in the certified units. The lawfulness of that stand is now tested under a complaint which narrowly alleges an 8(a)(5) violation based upon the latter's refusal to honor a request by Local 876 for certain information. The facts supporting that specific allegation are conceded and, as an abstraction, that question has been given only cursory attention in this proceeding. Indeed, the information sought — namely, the names and mailing addresses of employees in each of the respective units — was the subject of formal requests, duly communicated to the Respondent in unequivocal form, and accordingly, constituted producible data under a large body of Board precedent.[7] See e.g. *Nazareth*

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[3] 262 NLRB 423 (1982).

[4] In 1983, the Sixth Circuit Court of Appeals denied enforcement of the Board's Order. See 717 F.2d 1033 (6th Cir, 1983).

[5] 105 S.Ct. 984.

[6] See General Counsel Exhibit 6.

[7] See General Counsel Exhibit 2.

Literary & Benevolent Institute, Inc., 282 NLRB No. 10 [ID p. 8-9 (1986)].

Respondent's defenses reduce that limited issue to a vehicle for again testing the basic duty to bargain, for, it now asserts that its refusal was justified by events occurring since 1982 which invalidate the certifications. More specifically, Respondent first claims that Local 876 is not a legitimate successor to the certified representative, Local 40, and hence it has no duty to treat with that Union.[8] Alternatively, Respondent argues that any current duty to bargain has been eliminated by subsequent developments which have rendered inappropriate, the units in which the 1981 elections were conducted.

B. *Defenses to the Refusal to Bargain*

1. The Status of Local 876 as a Successor to the Certified Representative

Pursuant to settled authority, mergers of labor organizations will be honored by the Board if: (1) those entitled to participate in the process are afforded an opportunity to consider, discuss and vote on the question through a reasonably democratic process, and (2) the

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[8] The General Counsel contends that any right to contest the merger was waived because not raised by Respondent until the filing of its answer to the instant complaint. There is no merit in this claim. The General Counsel does not indicate and I am not persuaded that this issue could have been expeditiously raised and litigated at an earlier time. To the extent ascertainable on this record, Respondent was first notified of the merger through the Charging Party's letter of 18 March 1985 (General Counsel's Exhibit 2). Thus, it presumably was unaware of that development when the Supreme Court issued its decision on 19 February 1985. In this light, the instant proceeding provided the first appropriate opportunity for the Respondent to raise the question. No rule or policy is called to my attention obligating a charged party, in these circumstances, to communicate a putative defense prior to the filing of an answer. The Board's decision in *Colonial Manor 1977, Inc.*, 253 NLRB 1183, 1184 (1981), fails to support any such requirement.

merger does not alter the fundamental identity of the selected representative so as to disrupt the continuity of representation. See *NLRB* v. *Financial Institution Employees, Local 1182 (Seattle-First National Bank)*, ___ U.S. ___, 121 LRRM 2741, 2745-2748 (1986), 106 S.Ct. 1007; *Canterbury Village of Waterford, Inc.*, 282 NLRB No. 72 (1986). Respondent's rejection of Local 876 rests upon the claim that the merger was defective under both standards.

By way of background, it is noted that in 1981, at the time of the Board elections, Local 40 was situated in Flint, Michigan, with jurisdiction in the northeastern sector of the State. At the time of the merger, its membership numbered some 3200. Local 876 was much larger with some 19,000 members. The latter's geographic jurisdiction extended to 7 counties in southeastern Michigan, including the Detroit metropolitan area. It was and is now headquartered in Madison Heights, Michigan.

The internal steps preliminary to merger began and were completed in the summer of 1982. Respondent does not dispute that during that time frame, *members* of each of the respective Locals were given advance notice, the opportunity to discuss, and to vote by secret ballot upon the propriety of the merger.

Specifically, in the case of Local 40, all members were notified by letter dated 11 June 1982, that the merger had been under consideration by its Executive Board, that said Board recommended approval and that a special meeting would be held in Flint, Michigan, on 29 June 1982, and in Saginaw, Michigan on 30 June 1982, for presentation, explanation and discussion of the merger agreement and to allow the membership to

vote upon its acceptance or rejection.[9] In the ensuing special meeting at Flint, the merger was approved by a vote of 69 for, 18 against, and at that held at Saginaw, by a vote of 53 for, 21 against.[10] On each occasion, after the merger agreement had been read to the membership and discussion held, voting was conducted by secret ballot.

As for Local 876, on 25 May 1982, that Union's Executive Board met and approved the merger agreement, resolving to recommend that the membership concur.[11] Notice was provided by Local 876 through the latter's regular monthly publication which is routinely distributed to its entire membership.[12] Through that medium members were informed of the proposal and that it would be considered and voted upon on 6 July 1982 at a general membership meeting. That meeting was held as scheduled. In the course thereof the merger agreement and resolution were read to the members, a motion was made to approve, discussion followed, and after a secret ballot the merger was adopted by a vote of 97 for, and 28 against.[13]

Respondent's challenge to the fairness of this process rests entirely upon the fact that "nonmembers were not notified of the vote, nor allowed to participate." In this connection, it is a fact that employees in the bargaining units were nonmembers and that they, as well as all other represented nonmembers, were precluded from expressing their preference. With this as its premise,

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[9] See General Counsel Exhibit 5(a).

[10] See General Counsel Exhibit 5(b) and (c).

[11] See General Counsel Exhibit 4(a).

[12] See General Counsel Exhibit 4(b).

[13] See General Counsel Exhibit 4(c).

Respondent would invoke the *Amoco* doctrine[14] as applied in *F. W. Woolworth Co.*, 268 NLRB 805 (1984), a policy whereby the Board declined to recognize affiliation elections as binding upon employers unless nonmembers were allowed to vote.

The *Amoco* doctrine subsequently was overruled by the Supreme Court in *NLRB* v. *Financial Institution Employees, Local 1182 (Seattle-First National Bank)*, *supra*. The Court viewed the Board's fragmentation of an established bargaining relationship in the effort to enforce the enfranchisement of nonmembers as unduly offensive to the statutory policy encouraging stability in existing bargaining relationships. The Board's position was also criticized by an intrusion into internal affairs of labor organizations neither intended by Congress, nor authorized by the Act. Central to the Court's position was an entreaty that the Board not withhold its remedial powers to condone an employer's termination of a bargaining relationship, absent evidence of loss of majority and the existence of a question of representation that would thereby emerge.

Respondent would distinguish *Seattle-First National* on grounds that the disenfranchisement of nonmembers in that case related to affiliation, not merger. However, this assertion is unaccompanied by explanation, and it is difficult to imagine, just why the controlling statutory policies would be any the more relaxed in one context or the other. In either case, a matter of internal union concern is central to the controversy and Board intrusion is to be tested in light of whether the withholding of a bargaining order would "effectively decertify the reorganized union even where [reorganization] does not raise a question of representation."

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[14] *Amoco Production Co.*, 262 NLRB 1240 (1982).

121 LRRM at p. 2747. The analysis of the Supreme Court leaves no room for doubt on this score:

> Under the Act, a certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation raises a question of representation . . . .
>
> * * *
>
> [A]n affiliation may affect a union's representation of the bargaining unit even if it does not raise a question of representation, but that argument overlooks the fact that a union makes many decisions that "affect" its representation of nonmember employees. It may decide to call a strike, ratify a collective-bargaining agreement, or select union officers and bargaining representatives. Under the Act, dissatisfied employees may petition the Board to hold a representation election, but the Board has no authority to conduct an election unless the effects complained of raise a question of representation. In any event, dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters like affiliation. Rather, the Act allows union members to control the shape and direction of their organization, and "[n]on-union employees have no voice in the affairs of the Union." . . . We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support.

Obviously, the exclusion of nonmembers from a merger vote is no more suggestive that they do not support the

emerging union than in the case of affiliation. In either case, a question concerning representation is not inferrable on that basis alone.[15] See *United Retail Workers Union Local 881* v. *NLRB (May Department Stores)*, 797 F.2d 421 (7th Cir, 1986).

Accordingly, contrary to Respondent, *Seattle-First National, supra,* is dispositive of the fairness issue, and on authority of that decision it is concluded that the exclusion of nonmembers from the merger process created no impediment to Board recognition and enforcement of accession by Local 876 to Local 40's representational interests.

In the alternative, Respondent contends that the merger produced "a significant change in actual identity and [that] a substantially different organization exists." The limitations on the Board's authority to terminate a certification on this ground as expressed in *Seattle-First National, supra,* possessed a familiar ring. Once more the Court warned that "if the changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation, and the

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[15] It is not surprising that the Board failed to distinguish between affiliation and merger in applying the *Amoco* rule. In this regard, the Board stated in *F.W. Woolworth Co., supra,* at page 806 as follows:

> The *Amoco* case involved an election in which nonmembers of the independent were barred from voting on the affiliation with the International. The same principles apply, however, when, as here, there is a merger between two locals within the same International union. In both instances the certified union is replaced by a different entity from that designated by the unit employees. In both cases a factor of primary importance is whether the affected employees had an opportunity to pass on the change of representative. That a merger election involves locals of the same parent union does not diminish the impact of the change on the employees or extinguish the due process requirement that all employees in the bargaining unit be afforded the opportunity to vote.

Board may then conduct a representation election." 121 LRRM at p. 2748. The keyword is "dramatic", a term to be evaluated in accordance with traditionally accepted causes of a question of representation.

In this respect, as heretofore indicated Local 40 at the time of the merger was one-tenth the size of Local 876. Each Local represented a distinct geographic area. Local 40 was abolished by the merger and its headquarters closed. On the other hand its incumbent business representatives were integrated into the administrative structure of Local 876, without change in responsibility. The president of Local 40 was added to Local 876's Executive Board, and held the official position of "Executive Assistant to the President of Local 876." He retained primary responsibility for all negotiations and grievance activity in areas previously serviced by Local 40, while continuing to supervise the former business representatives of that Local.

Against this background, the Respondent argues that the merger produced "a total loss of identity of an existing organization through infusion into another organization six (6) times its size." In terms of precedent, Respondent's position is grounded upon the policy of the Third Circuit Court of Appeals evident from such cases as *Sun Oil Company of Pennsylvania* v. *NLRB*, 576 F.2d 553 (3rd. Cir, 1978); *NLRB* v. *Bernard Gloekler North East Co.*, 540 F.2d 197 (3rd. Cir, 1976) and *American Bridge Division, U.S. Steel Corporation* v. *NLRB*, 457 F.2d 660 (3rd. Cir, 1972). All involved an independent union's affiliation with an established international union. In each, the Court concluded that the reorganization altered the union's "structure, administration, assets, membership, autonomy and by laws," consequences regarded as *sufficiently dramatic* to give rise to a question concerning representation. In

due respect to the Court, these holdings are difficult to reconcile with *Seattle-First National, supra*; they appear to draw their essence from routine or inherent consequences of any internal reorganization — be it affiliation or merger — and in that sense prove too much. Thus, it is difficult to imagine an affiliation or merger that would not expose members to a new set of obligations and allegiances or result in a loss of autonomy and control, or which would not lump concerns of those affected with those of thousands of other members. In drawing upon these normal, forseeable consequences to disrupt the continuity of representation, the Third Circuit might well have adopted a *per se* rule, which exposes established bargaining relationships to greater jeopardy than did the abortive *Amoco* doctrine. To the extent that those decisions afford primacy to the traditional effects of an internal union reorganization over reasonable evidence as to the preference of unit employees, the Third Circuit's view collides with *Seattle-First National, supra.*

As the cornerstone of the Supreme Court's rationale in *Seattle-First National, supra,* was a stern signal that the policy encouraging stable bargaining relationships yield only in those circumstances where the organizational changes are so vast as to give rise to a more than speculative inference that majority support no longer exists. 212 LRRM at p. 2748. Consistent therewith, and in contrast with the Third Circuit, the First Circuit Court of Appeals in *NLRB* v. *The Insulfab Platics, Inc.*, 789 F.2d 961, 968 (1st Cir, 1986) recently stated that: "... where the union membership has expressed its desire to affiliate ... and the contuing majority support of the original bargaining representative is not in doubt, we are not inclined to override the Board's judgment that substantial continuity exists ... ." The statutory values underlying this holding are in consonance with

the Fifth Circuit which earlier had taken a dim view of the weight to be given inherent effects of internal union reorganizations. Thus, in *J. Ray McDermott & Co., Inc.* v. *NLRB*, 571 F.2d 850, 857-858 (5th Cir, 1978), that Court, in contrast with the Third Circuit, stated:

> The factual determination at issue revolves not around superficial criteria such as the size of the respective locals or organizational differences in the national unions of which they become a part. Rather, we must consider whether changes have occurred in the rights and obligations of the union's leadership and membership, and in the relationships between the putative bargaining agent, its affiliate, and the employer.

Here, the effort to excuse any obligation to recognize Local 876 on this ground is unaccompanied by evidence that unit employees suffered a change in constitutional obligations or that collective-bargaining policy or employee services were materially affected in the critical areas of contract negotiation and grievance administration. Employees were to receive the same services, through the same individuals. Moreover, there is no substantive proof or appearance that employees would be led to believe that the merger was likely to produce a change either in the nature and quality of their representation or in the relationship between the designated representative and their employer. See e.g. *Kentucky Power Company*, 213 NLRB 730, 731 (1974); *F. W. Woolworth Co.*, 194 NLRB 1208 (1972); *United States Gypsum Company*, 164 NLRB 931 (1967).

Respondent, thus, has failed to substantiate either deficiency in the procedures by which Local 876 succeeded to the bargaining interests formerly held by Local 40 or that the merger produced a breach in the

continuity of representation. Hence this internal union matter failed to affect the ongoing obligation to bargain.

2. Supervening Changes
Within the Collective-Bargaining Units

Respondent also denies any current obligation to recognize and bargain with Local 876 on the ground that the 1981 elections were conducted in units which no longer are appropriate.[16] Respondent in this respect is charged with a rigorous burden. The evidence necessary to terminate an extant bargaining relationship must be "clear, cogent, and convincing." *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir, 1978); *NLRB* v. *Wilder Construction Co.*, 804 F.2d 1122, 1125 (9th Cir, 1986). Here, the law is even more exacting, for the defense is addressed to a period in which Respondent declined to honor Board certifications.[17]

Turning to the facts, here the elections were held in separate units consisting of (1) main-office clerical em-

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[16] There is no merit in the contention by the General Counsel that Respondent is estopped or otherwise procedurally barred from raising this defense. Insofar as this record reveals, the instant proceeding provides the most practicable vehicle for contesting the certifications on that basis. Moreover, contrary to the Charging Party, even after a duty to bargain is lawfully fixed, the Board has the authority, in a proper case, to absolve the employer from that obligation. This is so even where the employer's refusal to bargain takes place during the certification year. See *St. Bernadette Nursing Home*, 234 NLRB 835 (1978); *Trojan Boat Company*, 175 NLRB 935 (1969).

[17] As a general rule, a certified representative initially is entitled to an unimpeded opportunity to bargain for 12 months. "[A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." See *Franks Brothers Company* v. *NLRB*, 321 U.S. 702, 705 (1944). Respondent's election to contest the validity of the certification has denied employees the benefits of collective-bargaining during the protected term. See e.g. *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785 (1962). Absent unusual circumstances, there is no relief from the duty to bargain during that period. *Ray Brooks* v. *NLRB*, 348 U.S. 96 (1954) at p. 103.

ployees, and (2) all other employees at Respondent's nine stores and warehouses then existing in the Metropolitan area of Flint, Michigan. As Respondent observes, since 1981, the separate units have experienced extensive turnover. Among those who voted, only two are still employed in the bargaining units.

Under the precedent, employer appeals based upon employee turnover have failed to generate overriding sympathy. Even where voluminous, this factor creates little more than ambiguity as to the present preference of employees or as to what would have been their choice had recognition been conferred and bargaining ensued in timely fashion.[18] For that reason employees hired after designation of the Union are presumed by law to support the Union to the same extent as those replaced.[19] The converse of that principle is no less

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[18] Respondent cites *Westinghouse Electric and Manufacturing Co.*, 38 NLRB 404 (1942) in support of its claim that the expanded work force excuses it from any obligation to bargain. That case is clearly distinguishable. It did not involve employer self-help to fragment an established bargaining relationship. There, the Board during prelection stages took an innovative step to avoid delaying an election in the face of an employer's nonverifiable contention that it planned in the future to expand its plant so as to quadruple the size of the work force. The desirable policy of encouraging stability in existing bargaining relationships was neither in issue nor impeded by the Board's desire to expedite employee choice through direction of a conditional election.

[19] *Pennco, Inc.*, 250 NLRB 716 (1980). As Respondent observes, in *United Artists Communications Inc.*, 280 NLRB No. 119, ftn. 4, Chairman Dotson and Member Dennis expressed a willingness to consider evidence of turnover and its negative influences upon union representation in the "context" of evaluating whether a remedial bargaining order is a necessary to redress unfair labor practices which arguably are sufficiently serious to undermine a union's majority. Beyond that dictum there is no evidence that a majority of the Board in any case has overruled the general policy that such evidence alone will not be treated as indicative of loss of majority. In any event, reliance upon turnover in assessing "the potential for conducting a fair election against . . . [a] . . . background of unlawful activity . . ." is far less threatening to accepted statutory policy than in cases testing the lawfulness of a withdrawal of, or refusal to grant recognition in the context of a rightfully established bargaining relationship.

conjectural, and hence turnover stimulates argument but no firm suspicion of loss of majority. Moreover even less weight is given to turnover following a refusal to bargain. As was emphasized in *NLRB* v. *J. W. Rex Co.*, 243 F.2d 356, 360 (3rd. Cir, 1957):

> It is essential to note that the merger which respondent company contends rendered the unit inappropriate occurred only two months after certification of the union as a bargaining agent. A valid certification is, of course, not intended to be a permanent relationship irrespective of changed conditions. But an employer cannot rely on the changes to justify his refusal to bargain when those changes occur within the certification year, and especially where, as here, the first refusal to bargain occurred before the modification of the unit structure. *N.L.R.B.* v. *Armato*, 7 Cir., 1952, 199 F.2d 800, 803. . . . *N.L.R.B.* v. *Prudential Insurance Co.*, 6 Cir., 1946, 154 F.2d 385, 389, ...

In *Frank Bros. Company* v. *NLRB*, 321 U.S. 702 (1944), the Supreme Court approved an order that "an employer bargain exclusively with the . . . union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority." 321 U.S. at p. 705. The Court reasoned as follows:

> [A] requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain. * * * . . . [W]ere . . . [the Board to] . . . instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to

> bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. 321 U.S. at p. 704-705.

In the face of these controlling principles, it is difficult to identify any statutory policy which would be furthered by giving turnover any greater recognition in this case.

Aside from turnover, Respondent attacks the units on the basis of "functional" and "operational" changes allegedly manifested by relocation of existing stores and the opening of new stores, as well as increases in employee complement and manhours within the established units. It is true that since 1982, manhours required to operate the stores and square footage have increased, six new stores have opened in the Flint area, and three of the original nine stores have relocated, albeit in the same trade or market area. Contrary to the Respondent, these factors, considered together or separately, are merely reflective of economic growth achieved through normal business successes during the substantial delays attributable to its own failure to recognize the results of the Board elections. Forseeable consequences of this nature, derived, as they are, from delays occasioned by an employer's good faith, but unsuccessful and illegal challenge to the validity of a certification, furnish no basis for negating objectives of the Board's election procedures and the need to preserve public confidence in that peaceful process. That which is predictable is not unusual, and it is entirely within the realm of possibility that the operational changes herein would have had no significant impact upon the emerging bargaining relationship had Respondent accepted the results of the 1981 elections. "Given the Act's principal purpose of prompting stability in the workplace, once employees have chosen to be represented and their

choice has been certified, the Board has been reluctant to find unusual circumstances." *Paper Manufacturers Co.*, 274 NLRB 491, 496 (1985).

In concluding that the supervening business adjustments did not give rise to "unusual circumstances," it is noted that the basic character of the employing enterprise was not altered thereby either in terms of products sold, services made available, equipment utilized or the nature, quality or interests of the work force. Classifications have remained unchanged and bargaining unit work is not shown to be functionally different from that performed at the time of the elections. Thus, the separate community of interest and identity delimited by the original unit determinations does not appear to have been blurred by interchange or other factors which preclude effective collective bargaining or render that process economically impracticable or impossible.[20]

Accordingly, it is concluded that Respondent's obligation to recognize and bargain with Local 876 remains viable, and thus its failure, upon request, to furnish the names and addresses of employees in the appropriate units violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[20] Cf. *Renaissance Center Partnership*, 239 NLRB 1247 (1979) where consolidation of an unrepresented group of security employees with a smaller, recently certified unit composed of individuals within that same job classification, "... completely obscured the separate identity of the certified bargaining unit ...". 239 NLRB at page 1248.

2. Local 876 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing, upon request, to furnish the exclusive collective-bargaining representative names and addresses of employees in the appropriate units, data relevant and necessary to the performance of that Union's duty as exclusive collective-bargaining agent.

4. The unfair labor practices found above constitute unfair labor practices having an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. Moreover, inasmuch as Respondent continues to challenge the status of Local 876 as the exclusive representative of the employees in question, to ensure that these employees are accorded the services of their collective-bargaining agent for the period provided by law, the certification year shall be construed as commencing on the date that the Respondent begins to bargain in good faith. See *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785 (1962); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir, 1965).

Counsel for the General Counsel in a 17 page "boiler plate" motion urges that the remedy include a "visitorial clause" authorizing the Board to engage in discovery if necessary to monitor compliance with any

remedial order issued herein. However, the Board previously has declined to broaden its standard remedial formula in this respect. As there is no showing or argument as to how the specific conduct under scrutiny in this proceeding warrants such relief, the posture of the General Counsel here is no different than in the several cases where the identical motion has been denied uniformly. See *O. G. Willis Co., Inc.*, 278 NLRB No. 29 (1986); *Nathan's Furniture Store of Hazleton, Inc.*, 278 NLRB No. 34 (1986); and *Rebel Coal Co.*, 279 NLRB No. 22 (1986). Based on the cited authority, the request is denied.

Upon the entire record in this proceeding, including the findings of fact and conclusions of law made above, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

Respondent, Action Automotive, Inc., Flint, Michigan, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

   (a) Refusing to bargain in good faith by failing, upon request, to furnish information relevant and necessary to the performance of duties required of the exclusive bargaining representative of Respondent's employees.

   (b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

---

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

   (a) Furnish the Union with a list of employees in the appropriate units, together with their current addresses.

   (b) Post at those of its facilities in Flint, Michigan, which are within the appropriate collective-bargaining units, copies of the attached notice marked "Appendix." [22] Copies of the notice on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

   (c) Notify the Regional Director for Region 7 in writing within 28 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated Washington, D.C. 10 February 1987

/s/ Joel A. Harmatz
Administrative Law Judge

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[22] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse, upon request, to furnish information which is relevant and necessary to the performance of the duties of LOCAL 876, UNITED FORD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, as exclusive collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights set forth at the top of this notice.

WE WILL give the Union lists of the names and addresses of current employees in the established collective-bargaining units in the Metropolitan area of Flint, Michigan.

ACTION AUTOMOTIVE, INC. (*EMPLOYER*)

Dated _____ By _____
(*Representative*) (*Title*)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office: Patrick V. McNamara Federal Building, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226, Telephone number 313-226-3244.

Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-713

In the Supreme Court of the United States

OCTOBER TERM, 1988

ACTION AUTOMOTIVE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board acted within its discretion in ordering petitioner to bargain with the certified representative of its employees notwithstanding events that occurred while petitioner was litigating its obligation to bargain.

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ACTION AUTOMOTIVE, INC., PETITIONER

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B6) is reported at 853 F.2d 433. The decision and order of the National Labor Relations Board (Pet. App. C1-C2), including the decision of the administrative law judge (Pet. App. D1-D22), is reported at 284 N.L.R.B. No. 36.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1988. The petition for a writ of certiorari was filed on October 28, 1988. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner sells and distributes automobile parts and related products and services. In May 1981, Local 40,

United Food and Commercial Workers International Union, AFL-CIO (Local 40) won Board-conducted elections in a unit of clerical employees at petitioner's main office and a separate unit of the store and warehouse employees at the nine stores petitioner then operated in the Flint, Michigan, area. *Action Automotive, Inc.*, 262 N.L.R.B. 423 (1982). In January 1982, the Board rejected petitioner's objections to the conduct of the elections and certified Local 40 as the representative of petitioner's employees in the designated units. Petitioner refused to bargain with the union in order to test the certification. The Board denied petitioner's appeal and ordered it to bargain, with the initial period of certification to commence on the date good faith bargaining began. 262 N.L.R.B. at 425. The court of appeals denied enforcement of the Board's order, 717 F.2d 1033 (6th Cir. 1983), and this Court reversed. *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490 (1985). The Board's 1982 order was enforced by the court of appeals on May 13, 1986. Pet. App. D4; 794 F.2d 213.

2. In March 1985, shortly after this Court's remand, Local 876, United Food and Commercial Workers International Union, AFL-CIO (Local 876 or the Union) notified petitioner that it had merged with Local 40 and had succeeded to Local 40's representation rights. The Union requested the names and addresses of all unit employees and asked that petitioner bargain with it, in compliance with this Court's decision. Petitioner refused the request on the ground, inter alia, that the 1981 elections were conducted in units that were no longer appropriate and that, accordingly, it had had no current obligation to bargain with the union. Pet. App. B2, D4-D5. Additional unfair labor practice charges were filed, and a complaint issued, alleging that petitioner had violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1)

and (5), by refusing to furnish the requested information. Pet. App. D4.

The Board sustained the allegations of the complaint. It rejected petitioner's contention that employee turnover, increases in the employee complement, and operational changes manifested by the relocation of existing stores and opening of new ones justified its refusal to bargain. Relying on *Brooks* v. *NLRB*, 348 U.S. 98 (1954), the Board explained that, "absent unusual circumstances, a union's majority status is *irrebuttably* presumed to exist throughout the 1-year period following the union's certification," and that employee turnover since the certification is "not the sort of 'unusual circumstance' (such as dissolution of or substantial schism within the Union) that would permit rebuttal of the Union's presumed majority status[.]" Pet. App. C1-C2 n.1 (emphasis in original). The Board further noted that petitioner's expansion of the workforce and relocations "are merely reflective of economic growth achieved through normal business successes during the substantial delays attributable to its own failure to recognize the results of the Board elections." *Id.* at D17.[1]

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[1] In finding that these changes did not alter "the basic character of the employing enterprise" (Pet. App. D18), the Board noted that (*ibid.* (footnote omitted)):

> Classifications have remained unchanged and bargaining unit work is not shown to be functionally different from that performed at the time of the elections. Thus, the separate community of interest and identity delimited by the original unit determinations does not appear to have been blurred by interchange or other factors which preclude effective collective bargaining or render that process economically impracticable or impossible.

Three of the stores covered by the 1982 certification had since relocated to larger quarters in the same trade or market area. Pet. App. D17. Employees at the additional stores petitioner had opened were not within the designated bargaining units (*id.* at B4; see 262 N.L.R.B. at 425), and would not be covered by the bargaining order here.

Accordingly, the Board found that petitioner had violated Section 8(a)(1) and (5) of the National Labor Relations Act by refusing to furnish the Union with relevant information, and the Board ruled that the one-year irrebuttable presumption period following the Union's certification as bargaining representative would commence on the date that petitioner began to bargain in good faith with the Union. Pet. App. D19 (citing *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962)). The Board ordered petitioner, inter alia, to furnish the Union with a list of employees in the bargaining units and their current addresses. *Id.* at C2, D20-D22.

3. The court of appeals affirmed the Board's decision and enforced its order. Pet. App. B1-B6. The court rejected petitioner's claim that its "massive expansion" excused its refusal to bargain, since "the certification affects only present employees at the locations in existence when the election was held." *Id.* at B4. The court found that the cases relied on by petitioner in which the Board had found unusual circumstances sufficient to overcome the *Brooks* presumption were factually distinguishable from this case and that, in any event, "[t]he exception to the certification year rule permitted in those two cases applies only when the Board * * * considers a formal petition for an election filed during the certification year, not when an employer has resorted to 'self-help' by refusing to bargain." *Id.* at B5. Relying on *Brooks,* 348 U.S. at 103, the court noted that " '[i]f an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit. Although the Board may, if the facts warrant, revoke a certification or agree not to pursue a charge

of an unfair labor practice, these are matters for the Board; they do not justify employer self-help or judicial intervention.' " Pet. App. B6.

ARGUMENT

The court of appeals' decision is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. This Court held in *Brooks,* 348 U.S. at 104, that barring unusual circumstances a union's majority status may not be questioned during the year following the union's certification. The certification year has never started to run in this case, because that period does not begin until the employer commences bargaining with the union in good faith, and petitioner has not yet done so. Petitioner does not dispute those principles. Rather, it asserts that employee turnover and expansion of its operations during the period it was litigating its objections to the representation election constitute unusual circumstances within the meaning of *Brooks* and therefore justified petitioner's refusal to bargain. There is no merit to that contention.

This Court has consistently held that a union's loss of majority status during delays due to litigation does not terminate an employer's obligation to bargain with the union. Otherwise, as the Court explained in *Franks Bros.* v. *NLRB,* 321 U.S. 702, 705 (1944), "procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law." See also *NLRB* v. *Katz,* 369 U.S. 736, 748 n.16 (1962); *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 610-611 (1969). See *Fall River Dyeing & Finishing Corp.* v. *NLRB,* No. 85-1208 (June 1, 1987), slip op. 9-11.

This case aptly illustrates that concern. The Union proved its majority status seven and one-half years ago by winning an election among petitioner's employees. The entire period of time since that election has been consumed in litigating petitioner's objections to the election (including review by this Court) and the additional unfair labor practice charges brought against petitioner because of its continuing refusal to bargain with the Union. Under these circumstances, petitioner cannot properly rely on employee turnover and expansion of its business[2] during the process of litigation as a justification for its continuing refusal to bargain.[3]

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[2] The Board found that the business expansion in this case was "merely reflective of • • • normal business successes." Pet. App. D17. The court of appeals rejected petitioner's claim that its business had undergone a "massive expansion" of a type that constitutes an "unusual circumstance" under *Brooks*. Pet. App. B4.

[3] Although, as petitioner notes (Pet. 9-10), it was not required to negotiate with the Union during the pendency of its certification challenge, petitioner continued to refuse to recognize and bargain with the Union even after this Court had finally upheld the propriety of the certification. *Franks Bros.* makes clear that petitioner was free to challenge the Union's certification, but also that petitioner is not relieved of the foreseeable consequences of the time consumed by its litigating strategy once litigation has confirmed its obligation to bargain with the Union. None of the cases cited by petitioner is to the contrary.

Moreover, contrary to petitioner's assertion (Pet. 9-10), it could have bargained with the Union, subject to its challenge to the certification, and made any resulting contract conditional on ultimate judicial validation of the certification. See *United Aircraft Corp.* v. *NLRB*, 434 F.2d 1198, 1200-1201 (2d Cir. 1970), cert. denied, 401 U.S. 993 (1971). The cases petitioner cites, *Technicolor Government Services, Inc.* v. *NLRB*, 739 F.2d 323, 326 (8th Cir. 1984), and *King Radio Corp.* v. *NLRB*, 398 F.2d 14, 20-21 (10th Cir. 1968), do not preclude that course. Those cases merely hold that, once a union had been certified, where an employer does not pursue its objections to an election

2. The courts of appeals have consistently rejected employers' claims of employee turnover as a justification for refusing to bargain with a Board-certified union during the certification year. See, *e.g.*, *NLRB* v. *Star Color Plate Service*, 843 F.2d 1507 (2d Cir. 1988), cert. denied, No. 87-2126 (Oct. 3, 1988); *NLRB* v. *Best Products Co.*, 765 F.2d 903, 913-914 (9th Cir. 1985); *NLRB* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (8th Cir. 1969). None of the cases cited by petitioner is to the contrary.

Petitioner cites (Pet. 11-14) several courts of appeals decisions for the proposition that employee turnover, expansion of the bargaining unit, and the passage of time, are relevant in determining whether a bargaining order should be enforced. Those cases, however, are inapposite since they did not involve a Board certification on the basis of an election. In each of those cases, the Board had issued a bargaining order under *NLRB* v. *Gissel Packing Co., supra. Gissel* held that, although Board "elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support," the Board may issue a bargaining order without holding an election, or a new election, when it determines that an employer's unfair labor practices "have made [it] unlikely" that a fair election or repeat election can be held. 395 U.S. at 602, 610. The cases cited by petitioner hold that, in making the determination whether a fair election can be held, the Board must take into con-

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by refusing to bargain with the union in order to obtain judicial review, the employer cannot later collaterally challenge that certification in a subsequent unfair labor practice proceeding. The court stated in *Peabody Coal Co.* v. *NLRB*, 725 F.2d 357, 365 (6th Cir. 1984), that recognition of a union during the pendency of a certification challenge might be taken as a waiver of the challenge. But that statement was dictum, because there was no issue of a conditional offer to bargain pending the certification challenge.

sideration the probable effect of past violations on present employees. See, *e.g., J.J. Newberry Co.* v. *NLRB,* 645 F.2d 148, 153 (2d Cir. 1981). None of the cases cited by petitioner held that the factors to be considered in that context affect the enforceability of a Board order to bargain with a union that was certified on the basis of an election, which is the preferred method of determining whether a union has majority support. *Gissel,* 395 U.S. at 602. See, *e.g., NLRB* v. *Star Color Plate Service, supra.*

The Board's decisions cited by petitioner are also distinguishable. *St. Regis Paper Co.,* 285 N.L.R.B. No. 39 (Aug. 10, 1987), slip op. 5-7, did not involve the certification year presumption. It was an accretion case (see 239 N.L.R.B. 688 (1978)), and the Board found that contraction of the employer's business, including the closure of the accreted location, rendered the bargaining order moot. In *St. Bernadette's Nursing Home,* 234 N.L.R.B. 835 (1978), the facility in which the union was certified was closed for economic reasons during the certification year. Although some of the represented employees were hired in a new and substantially larger facility, the Board found that the union's certification had not survived the closing, since the new facility replaced not only the unit in which the union was certified, but other closed facilities in which the union had not established any bargaining rights. 234 N.L.R.B. at 837. *Molded Fiber Glass Body Co.,* 182 N.L.R.B. 400 (1970), involved a plant that had permanently closed for business reasons during the certification year and reopened after that year had elapsed with only a "handful" of the former employees. The Board found that, under the circumstances of that case, which included good faith bargaining by the employer during the certification year, there was no reason to extend the period in which the union enjoyed an irrebuttable presumption of

majority status. 182 N.L.R.B. at 400-401.[4] The issue in *Westinghouse Electric & Mfg.*, 38 N.L.R.B. 404 (1942), and *Renaissance Center Partnership*, 239 N.L.R.B. 1247 (1979), was not whether an employer could refuse to bargain, but whether the Board, in the exercise of its discretion, would process an election petition within the certification year. As the court of appeals correctly noted (Pet. App. B5-B6), *Brooks* does not entitle an employer "to vindicate the rights of his employees to select their bargaining representative" by refusing to honor a certification instead of seeking recourse before the Board. 348 U.S. at 103. In any event, *Westinghouse* and *Renaissance Center Partnership* are factually inapposite.[5]

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[4] In citing *Molded Fiber Glass*, petitioner quotes (Pet. 9) from the decision of the administrative law judge, 182 N.L.R.B. at 403, but the ALJ's reasoning on that issue was not adopted by the Board. *Id.* at 400-401.

[5] In *Westinghouse*, in directing a representation election in the face of a projected quadrupling of the employee complement, the Board indicated that, if the size of the unit did grow as projected, the Board would process a representation petition filed by a rival union during the certification year. 38 N.L.R.B. at 409. Contrary to petitioner's contention (Pet. 13), the decisive factor in *Renaissance Center Partnership* was not an increase in the size of the bargaining unit, but rather the fact that the consolidation of the recently certified unit with a larger unit of unrepresented employees in the same job classification had "completely obscured the separate identity of the certified bargaining unit" (239 N.L.R.B. at 1248). In this case, by contrast, the Board expressly found that "the separate community of interest and identity" of the original bargaining units had not been affected by any intervening events. Pet. App. D18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1989

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